No. 10,312

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MACCO CONSTRUCTION COMPANY (a corporation),

Appellant,

vs.

A. L. FARR, R. P. SINCLAIR and YOUNG & SON CO., LTD. (a corporation),

Appellees.

BRIEF FOR APPELLEES.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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STATEMENT OF PLEADINGS.

Defendants appeal from a jury verdict awarding appellee damages for the wrongful breach of a contract for the furnishing of auto trucks and personal services. The complaint alleges (paragraph III):

> "That on or about the 3rd day of December, 1940, defendants and plaintiffs entered into an oral agreement * * * wherein * * * plaintiffs agreed to furnish four automobile trucks and the personal services of plaintiffs * * * and defendant agreed to hire the exclusive personal services of plaintiffs and said truck equipment for the entire duration of that certain grading and excavating project situated in the City and County of San Francisco; that relying upon said oral

agreement and pursuant thereto plaintiffs did purchase said number of automobile trucks and defendants did hire the personal services of plaintiffs and the use of said equipment for a period commencing on the 3rd day of December, 1940.

"That on or about the 18th day of January, 1941, defendants without cause discharged plaintiffs * * *

"That under and pursuant to said * * * agreement defendants agreed to pay plaintiffs * * * for compensation * * * and the use of said equipment the sum of $2.70 per hour per truck, and in addition thereto the sum of $1.43 per hour per truck on account of the payment of the salary, insurance, etc., of the driver of each truck * * * and that the period contracted for as aforesaid was and is approximately four months * * * that by reason of said breach * * * plaintiffs have been damaged in the total sum of $6400.00."

The answer of defendants (Paragraph III) alleges:

"Admit defendant Macco Construction Co. and plaintiffs entered into an oral agreement * * * wherein and whereby the plaintiffs agreed to furnish four automobile trucks and the personal services of plaintiffs * * * but deny that said agreement * * * was for the entire duration of that certain * * * project * * * and alleges that plaintiffs would furnish and maintain said automobile trucks in good, safe, serviceable and workable condition * * * for such time as this answering defendant should desire to avail itself thereof in connection with said grading and excavating project and for no other or longer purpose or period of time."

Paragraph V of the answer admits:

> "That under and pursuant to the agreement defendant agreed to pay plaintiffs $2.70 per hour per truck * * * and in addition thereto the sum of $1.43 per hour on account of payment of salary of drivers."

Then follows a denial of the remaining allegations plus the additional defense of Paragraph II of the second cause of action:

> "that the automobile trucks and each of them furnished by the plaintiffs to this defendant were not in good or serviceable or workable condition and that the plaintiffs did not maintain said trucks in good, safe, serviceable or workable condition * * *."

It is to be noted that in no place in the answer or in the affirmative defense is it alleged the contract entered into between the parties was contrary to law. Therefore, the only issues presented were:

(1) the duration of the contract,

(2) the cause of the termination of the contract, and

(3) the damages suffered, if any.

After a trial by jury a verdict was returned in favor of the plaintiffs in the sum of $2500.00.

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1. DURATION OF THE CONTRACT.

Appellant contends the contract was at will. The appellees contend it was for a specified time, to wit,

for the duration of the job, or approximately four months. Eliminating the oral testimony and concerning ourselves solely with the documentary evidence, we are immediately confronted with a writing to the effect that at the inception of the contract in December, 1940, it was contemplated that the appellees would at least have some income for a period of four months. (See Assignment, "Exhibit A", Tr. p. 234.) Upon this assurance appellees purchased trucks for the job.

The testimony of Farr and Sinclair, and of attorney O'Neill (Tr. pp. 50-64, 71-90), demonstrates that when the contract was being considered conversations and negotiations were exchanged to the ultimate end that for a period of four months Farr and Sinclair would be earning a sufficient sum of money out of which they could pay the sum of $875 per month, commencing with January 4, 1941, and every month thereafter until the total amount of $3500 was paid for the trucks. Upon this representation the assignment (Exhibit A) was made and accepted, and provided, among other things, that out of the *first moneys to become due and payable* (to appellees) from the Macco Construction Co. under (appellees') contract, $875 per month would be paid to Young & Son. This assignment was accepted by the Macco Construction Co. through its general superintendent, Ben Wells. Now, in this assignment it should be noted the word "*contract*" is used. Certainly *contract* means just one thing and that is a job for a certain period of time. And it must have been contemplated that period of

time would be four months, the duration of the job. Otherwise, why would Wells lead the sellers of the trucking equipment which was purchased by the appellees for the job, to believe that for a period of four months plaintiffs would have work? It is not conceivable that the general superintendent of the Macco Construction Co. would permit the sellers of the trucking equipment to rely upon the statement that Farr and Sinclair would make payments for a period of four months unless at that time Wells represented the job would last for that period. This document corroborates the oral testimony of Farr and Sinclair in this regard. The contract under which Macco performed the work provided the work was to be completed on or about April 1. (See testimony of District Engineer McLean, Tr. p. 32.) This contract was made between Macco Construction Co. and the Bethlehem Steel Co. The contract was entered into in November and the period for completion was April. This evidence, coupled with the testimony of Farr and Sinclair, the witness O'Neill's testimony, and the written assignment, demonstrates most forcibly that the question of the duration of the contract was decided in accordance with the evidence. The great weight of the testimony is in favor of the conclusion reached by the jury, and this factual question being resolved in favor of the plaintiffs, the reviewing tribunal will not disturb it where sufficient and abundant evidence appears.

Appellant contends there was no meeting of minds as to the duration of the contract. The jury found

otherwise. It is significant that for over a period of seventeen days plaintiffs worked in excess of 669 hours under extremely adverse conditions doing the work which was directed to be done by the appellant and being credited with the amount of such work, being furnished drivers by the appellant who used the appellees' equipment and who were paid on the basis of an agreed contract price, plus social security deductions and compensation deductions; appellant secured drivers from the local union to operate the trucks of the appellees (page 82); daily records were kept by the appellant of the work the drivers and appellees performed; work sheets were kept and filed under the supervision of appellant; after each load these work sheets were turned into the appellant for its records in charging the U. S. Navy or the Bethlehem Steel Co. on the basis of the dirt removed; the appellant took advantage of the benefits of the appellees' work and yet contend that there was no meeting of minds and that there was no contract. This was a factual question, and the jury, in deliberating upon these issues, considered all the contentions appellant advances here, the circumstances surrounding the entering into of the contract, the execution thereof, the work performed and the recognition given to this contract, and found as a fact that there was a meeting of minds, that the appellees were ready, willing and able to perform and that the contract was terminated without just cause by the appellant. The reviewing Court will not disturb a factual finding unless the great weight of the evidence is against such finding or the verdict is contrary to law.

2. THE CAUSE OF THE TERMINATION OF THE CONTRACT.

The evidence demonstrates the trucks were brought over to the Bethlehem property in December, 1940. The appellant's witness testified that dumping was to be done on the private property of the Bethlehem Steel Co. This element is only important to illustrate that the trucks were rented to the appellant. The appellant was the one who hired the drivers and directed them where to dump the haul. The question presented by the appellant is the following: First, while it admits a contract was entered into it contends that it was terminated (a) because the contract was illegal, and (b) because the equipment furnished was not in good and workmanlike order.

(a) LEGALITY OF THE CONTRACT.

This defense was not pleaded. Therefore it is not available to appellant now.

Jefferson v. Burhans, 85 Fed. 949.

The original contract being legal, the defense of illegality could not be raised on an isolated question asked during cross-examination of one witness, during the trial. In the pretrial conferences, and all the discussions with the trial judge, when the issues were limited, no mention was made of this additional defense. It was only after the appellees had rested their case in chief that an instruction was offered on this phase of the case.

The appellee contends the question as to the legality of the contract was not properly pleaded. It was

raised at a late period in the trial and therefore the appellant cannot for the first time take advantage of it. However, appellee will comment upon it in reply to appellant's brief.

The evidence discloses that all drivers were furnished through the appellant and that the appellant had control of the drivers. They were directed by the appellant as to where to go and appellant did direct the drivers to the private property of the Bethlehem Steel Co. It was only after working for some time, and after unusual and severe weather, and due to the muddy condition of the roads and property, that the drivers were directed to go outside of the property of the Bethlehem Steel Co. This circumstance prompted the appellant to invoke the defense that because there was no permit issued by the State of California under City Carriers Act to appellees the contract was void. We do not subscribe to this reasoning. The need of a permit is too remote from the cause of the breach.

Appellant has cited numerous and voluminous authorities to support its position. It contends these authorities hold the contract is void and therefore rights under it are unenforcable. In this premise they are mistaken. The cases cited are not applicable. The contract calls for the services of the two plaintiffs and for the furnishing by them of automobile trucks. This they did. City Carriers Act, 5134 Deering's General Laws, State of California, is a revenue raising measure and there is nothing in that act which prohibits the furnishing of personal services or of automobile trucks to the appellant to be operated by its

drivers and under its instructions and under the direction of its drivers. There is nothing in the contract contrary to public policy or law. Let us review appellant's cases.

U. S. Trading v. Newmark G. Co., 56 Cal. App. 176, was a suit for damages for the breach of a contract for the delivery of barley. During the period of time contemplated for the delivery of the barley, the United States Government placed an embargo on all grain and placed the burden upon the shipper to secure a permit for the shipping of such grain. In upholding a judgment in favor of the plaintiff, the Court held that in view of the past relationship between the plaintiff and the defendant it was the duty of the defendant to secure the permit and the burden was on the defendant to procure all necessary cars in which the grain was to be shipped, bills of lading, etc., inasmuch as the terms of the contract so provided. At most, the contract was not void; its operation was merely suspended. The contract was enforceable.

The next case cited is *Bayles v. Browning,* 133 Cal. App. 618. This was a landlord and tenant case and centers around the admissibility of evidence, the Court holding that evidence of conversations had prior to the time a written contract was entered into was admissible for the purpose of showing the intention of the parties. It has no bearing at all upon the legality of any contract.

The next case cited is *Preston v. Herminghaus,* 211 Cal. 1. Your Honor probably recalls this case which involved John W. Preston, formerly a Supreme Court

judge in the State of California. It involved an attorney and client and the construction of a contract for a contingent fee. A judgment was recovered by Judge Preston, the Court holding that ambiguities are most strongly construed against persons causing them.

How appellant can say that the foregoing authorities support its contention that the contract between Farr and Sinclair and Macco Construction Co. was void is beyond our interpretation of these cases.

Appellant contends that where a statute provides a penalty for an action, a contract founded on such action is void although the statute does not pronounce it void or expressly prohibit it. In this respect the appellant confuses legislation which is passed for the purpose of *revenue* and that which is passed for the purpose of *qualifying* an individual to do or not to do a certain act. In the first class of cases are licensing automobiles, or permitting persons to drive an automobile, or taxing businesses. The cases all hold this type of license is revenue raising and enforceable. (See cases *supra.*)

To the same extent one might consider the unlawfulness of driving an automobile at 45 miles per hour. Could it be said that although driving an automobile at this speed is against the law, a passenger would not have to pay for the fare because of a violation of the speed limit? (See *Ziemer v. Babcock & Wilcox,* 22 Fed. Supp. 384.)

The second class of cases deals with the qualifications and ability of persons to perform certain acts. In this class come licenses granted to doctors, law-

yers, dentists, master mechanics, etc. In this regard appellant cites the case of *City of Los Angeles v. Waterson,* 8 Cal. App. (2d) 331. This case is not important. This was an action to compel bondholders who had fraudulently received bonds of an irrigation district to pay for such bonds or to return them to the irrigation district. There is also a question of whether or not the officer selling the bonds was or was not interested in the sale, and the Court held that for equity to deny plaintiff relief in such an action the contract must have so infected the litigation as to be a part of it, and further held that section 58 of the Irrigation District Act was violated by reason of the interest of the officers in the sale of the bonds. The question involved four officers in the sale of the bonds which were not paid for or delivered, and by virtue of the provisions of said Irrigation District Act the officers making the sale or connected with it could not have any interest in the bonds bought and such sale to them or their assignees was void. Clearly this is not in point.

The next case cited is *Holm v. Bramwell* (erroneously cited at 30 Cal. App. (2d) 332, but which appears in 67 Pac. (2d) 114.) This case involved a mechanics lien. The contract was procured contrary to law and by a contractor in violation of the Contractors Law. The law itself prohibits *suits* by sub-contractors not licensed under the act, and the question involved the validity of the mechanic's lien secured under said subcontractors licensing law, and a suit thereunder. The law itself prohibits the bringing of the suit and the Court so held.

Again, in the next case cited *Citizens, etc. v. Gentry,* 20 Cal. App. (2d) 332, the Court was called upon to interpret the relationship between the contractor and the subcontractor, and the contractor's license under which the subcontractor worked. No such question appears here. Obviously, if one secures the right to sue under a particular law he must follow the permission given in that law to the letter.

No statute makes entering into the contract unlawful, without a license or permit. Both parties had the legal right to enter into this contract.

Again, *Houston v. Williams,* 53 Cal. App. 267, cited by defendant, involves a question of the fee to a real estate broker. The suit was brought for a fee rendered. The Act provided the manner in which suit should be brought. The contract for services was rendered before the plaintiff had a license. In upholding a judgment in favor of the plaintiff the Court held he could recover if he secured the license later. The Brokers License Act also provided that if a compliance with the statute was not made, suit would not lie. The Court held as a matter of law the contract was not void *ab initio* and suit would lie under it.

To the same effect, *Holm v. Bramwell* (supra).

Defendant misconstrues the meaning of the phrase *"ab initio"*. Certainly, the contract here entered into was not void from its inception. By the widest interpretation it could not be said that the purposes of this contract were contrary to public policy and therefore contrary to the law. Obviously not. There is no

causal connection between the purposes of that contract, i. e., the leasing of four automobile trucks to the appellant, and the operation of said automobile trucks by the appellant without a permit for that particular job. Now, it must be remembered that all of these automobile trucks had a license to operate. The revenue raising measures only concerned the hiring out to the public at large in the same capacity as a common carrier. In such cases the Railroad Commission had the right to insist a permit was issued, and upon failure to have a permit, certain fines and penalties could be invoked. (See *Ziemer* case supra.) They were never invoked here.

So, in the case of *Hann v. Steinman,* 159 Cal. 142, this was a contract case involving the rescission of a contract on the grounds of mutual mistake. The contract was to erect a building contrary to law. Both parties were mistaken that such a building could be built. Upon the rescission, the Court held that under the circumstances this was a proper remedy. No question of illegality of contract at all was involved.

Dunn v. Stegmann, 10 Cal. App. 38, involved the erection of a saloon near a church. Both parties knew that there was a law preventing the erection of such saloon, and, in violation of said law, agreed in writing to erect such saloon. Obviously such is not the case here.

There is no evidence that a license or a permit could not be obtained. In fact, a license was applied for and appellant assured appellees that it was not necessary

to have a license because the hauling was to be done within the property of the Bethlehem Steel Company. Besides, the Macco Construction Company had a permit and the automobile trucks were under its supervision.

Brasher v. Giannini, 131 Cal. App. 706, is not in point. In that case the plaintiff paid $5600 deposit for wine during the prohibition era under the impression that she could distribute the same as sacramental wine. She was told by the defendant that she could qualify as such distributor. Upon being informed that she could not qualify under the prohibition laws, she sued for a recovery of her deposit. In upholding such a recovery, the Court held that she was entitled to rescind and to a return of her money on the grounds of a mutual mistake. Certainly, this case is not in point.

If a permit was needed, the duty rested upon the appellant Macco Construction Company. It is appellees' contention that no permit was necessary.

In *Schroeder v. Wheeler,* 126 Cal. App. 367, also cited by defendant, plaintiff at the request of another performed legal services which involved the services of a patent lawyer as well as the services of the lawyer in the State. The Court held that the plaintiff could recover for legal services rendered to defendant as patent lawyer, but could not recover for services for which he had no license to perform in California. A recovery was sustained for services rendered as a patent lawyer.

Appellant confuses the doctrine of law between contracts *malum in se* (against good morals) and those which are *malum prohibitum* (merely prohibited by statute). Contracts *malum in se,* of course, are void as being against public policy and good morals, and are usually founded upon a statute which has for its purpose the qualifying of individuals and corporations to do business according to skill and education, and for the protection of the public at large. Contracts which are *malum prohibitum* are merely revenue raising, and of course, if the parties are *in pari delicto,* the Courts will not enforce a contract. But where there is no question of public morals, the contract itself is enforceable and valid, and the parties are not *in pari delicto.* All of the cases cited by appellant confuse this distinction. For example:

Gardner v. Tatum, 81 Cal. 370. In this case a physician practicing medicine in the State of California when he had no legal right to practice was prevented from recovering for the services he rendered before he was licensed to practice. Of course, this case has no bearing and is no authority for the rendering of personal services and the leasing of automobile trucks.

In "Restatement of Law" there is set forth a number of exceptions to the rules of enforceability of contracts where a permit might be necessary to perform part of the work. For example:

> "Where a party is ignorant of the fact that a license might be necessary."
>
> Restatement, #599.

"Where the illegality is unessential and might be disregarded without defeating the primary purpose of a contract."

Restatement, #603.

"If the object of a statute or ordinance in imposing the requirement of a license is for the purpose of raising revenue, the contract made by an unlicensed person, the contract is valid even though he may be subject to a penalty for his failure to secure a license."

Wood v. Krepps, 168 Cal. 382, 143 Pac. 691;

Levinson v. Boas, 150 Cal. 185, 88 Pac. 825;

Payne v. DeVaughn, 77 Cal. App. 399, 246 Pac. 1069;

Restatement of Law, #580.

The case of *Wise v. Radis,* 74 Cal. App. 765, cited by appellant, involved a real estate broker who sought to evade the Real Estate Brokers Law by acting through another agent and is not in point. Naturally, anyone who seeks to evade a law in conjunction with an unlawful act of another person cannot use the law for the purpose of such evasion.

The contract between Farr and Sinclair and Macco Construction Co. for their personal services and for the furnishing of four automobile trucks was lawful. No permit of any kind or character was necessary for the furnishing of such equipment, and such services.

Appellant cites *Industrial Development Co. v. Goldschmidt,* 56 Cal. App. 507. Here the premises were rented as a saloon under a lease that such premises were to be operated as a saloon. When the prohibition

amendment became operative the continuation of the business was contrary to law and the defendant's lease terminated. Plaintiff sued for rent on the lease. Relief was denied on the grounds that the law made it unlawful to use the premises as a saloon. Certainly, there is no comparison between the operation of a saloon contrary to law and the facts in the instant case.

The agreement between Farr and Sinclair and the Macco Construction Co. was legal. Therefore, the cases cited by appellant are not in point.

See:

Fewel & Davis v. Pratt, 17 Cal. (2d) 85;
Davis v. Chipman, 210 Cal. 609;
Duntley v. Kagarise, 10 Cal. App. (2d) 394.

These cases involved contracts prohibited by statute. They were saloon cases, commissions for real estate brokers, and the like. Naturally, if one would agree to make counterfeit money and then sought to enforce such a contract, he would be denied relief because the contract was illegal and the purposes of the contract were illegal. Both parties would be *in pari delicto.* But in the instant case no such set of facts appears.

Appellant also cites:

Tatterson v. Kaehrlien, 88 Cal. App. 34;
Payne v. DeVaughn, 77 Cal. App. 399;
Napa v. Calistoga, 38 Cal. App. 477.

In *Tatterson v. Kaehrlien,* supra, the plaintiff sued for damages for fraud in the sale of stock to him without a legal permit from the State of California for the sale of such stock. The Court held that damages could be recovered.

Payne v. DeVaughn, supra, was a case of an architect suing for a fee for work performed when he had no license to act as an architect.

In *Napa v. Calistoga,* supra, the question involved was one of pleading. A demurrer was sustained without leave to amend because the complaint did not allege permission of the Railroad Commission to sell property of a public utility as provided for in a statute in existence at that time.

However, in *Jefferson v. Burhans,* 85 Fed. 949, it was held that "a defendant cannot take advantage of the fact that the contract sued on is alleged to be illegal without pleading that defense and raising that issue in the pleadings".

Contracts involving *malum prohibitum* are enforceable. In *Gelpecke v. City of Dubuque,* 68 U.S. 221, the Court held that in contracts which might require a permit or parts of which may be illegal if performed while other parts are legal, the legal parts are enforceable.

> "Where part of a contract is complete and it can be determined what damage was suffered, the balance may be enforced."
>
> *McCullough v. Mitchell,* 71 Fed. (2d) 17;
> *Fitzgerald v. Union Central Life Insurance Co.,* 42 Fed. (2d) 76;
> *U. S. v. Bradley,* 35 U. S. 343;
> 30 *L. R. A.* 834.

Even though the parties to an action have been engaged in a transaction which is either *malum in se* or prohibited by law if the cause of action between them

is disconnected from the illegal action and not founded upon distinct and collateral causes, then the plaintiff is not obligated to resort to illegality in order to maintain the suit and the illegality of the former act will not impair or bar the right to maintain the suit. The test is whether the agreement sought to be enforced can be separated from the illegal act relied upon as voiding it.

Armstrong v. American Exchange Merchant Bank, 133 U.S. 433;
Dent v. Ferguson, 132 U.S. 50;
Hoffman v. McMullin (C.C.A.9th), 83 Fed. 372;
12 *Amer. Juris.* 719.

No case cited by appellant holds that under the circumstances present here the contract was void. Indeed, it would be a travesty on justice if one could take advantage of the work and effort of these plaintiffs, accept all the benefits, and then be relieved from paying compensation because plaintiffs, following the direction of the defendant, might be caused to violate some revenue statute. The trucks being under the control of the drivers of the appellant and the appellant instructing said drivers where to go, appellant was presumed to have the knowledge whether or not those trucks could be driven at the places they were so instructed to travel. Assume that the appellant, instead of instructing its drivers to drive these trucks on the public street, drove them on the property of third persons without the permission or consent of such third persons. An act of trespass, of course, had been committed. Trespass, of course, is unlawful. Could

it be said that because the drivers followed the instructions of the appellant in violating the law therefore the appellant would not be responsible for the contract price of hire of these trucks because of such unlawful act? All directions as to where the dump was to take place were given by the Macco Construction Co. Therefore, if in following out those instructions a law was violated, certainly it has no connection with the contract for hire.

Laws requiring licenses are divided into two classes: (a) those laws enacted for the purpose of raising of revenue, and (b) laws for the protection of the people such as corporate securities laws, licenses to practice law, licenses to practice medicine, dentistry, etc. If the laws are enacted for revenue, such as the licensing of automobile trucks and the like, and if a penalty is imposed for failure to secure such a license wherein there is no prohibition in the statute itself against the entering into a contract, then these contracts are enforceable under the law and a violation thereof does not make such contract a contract *malum in se.*

Van Wyke v. Burrows, 98 Cal. App. 415;
Wood v. Krepps, 168 Cal. 382;
Merchants Storage v. Insurance Co. of North America, 151 U. S. 368;
Ziemer v. Babcock & Wilcox, 22 Fed. Supp. 384;
20 *L. R. A.* 834.

Along this line comes a class of cases regarding the internal commerce laws such as the granting of rebate contrary to the provisions thereof. In these cases the

Courts have held that the contracts are not void and an action may lie.

Louisville v. Maxwell, 237 U. S. 94;
Louisville v. Williamson, 87 Fed. (2d) 34.

In the *Louisville v. Williamson* cases the rates charged were in violation of the Internal Commerce Act. A suit was brought for the difference in rates. The defense was made the contract was void because it violated the Internal Commerce Act. The Court held that the contract was not void and a suit would lie. There was no question of the parties being *in pari delicto;* there was no attempt to evade any law by either party, and the fact that a lesser rate was charged was far removed from the contract.

In commenting again on the question of the nature of a contract, in *Lloyd v. Johnson,* 45 App. D. C. 322, the Court held:

> "Where the purpose of a statute is to raise revenue and not to regulate such occupation, and no question of public policy or morals is involved, a contract made by one engaged in such occupation without having taken out a permit is not void."

Also, in the case of *In re Brown,* 24 Fed. Supp. 166, the Court emphasized the fact that because one of the parties failed to take out a license which was imposed for revenue purposes, and which provided a penalty upon the failure to do so, this would not necessarily of itself make the contract void, and used the following language:

> "An executed contract may not be set aside because one of the parties thereto has failed to

take out a license imposed for revenue purposes when a penalty only is imposed on the party not complying."

To the same effect is *Ziemer v. Babcock & Wilcox,* 22 Fed. Supp. 384,

"Where by a contract admitted to have been entered into by and between the parties, plaintiff agreed to and did perform certain services and in consideration of which defendant agreed to pay plaintiff, it cannot be held that the contract is illegal and void or unenforceable nor impose non-performance because of failure to take out a license."

6 *Corp. Juris* 721.

To the same effect:

Merchants Storage v. Insurance Co. of No. America, 151 U. S. 368.

The burden of proving the illegality of this contract rests upon the defendant and it has to prove it by sane and convincing evidence. There is no evidence in the record of any illegality in connection with the execution of the contract and the performance of the work thereunder. All of the authorities heretofore cited by appellant have no application to the issues at bar.

The whole question about the legality of contract is disposed of by referring to the case of *Ziemer v. Babcock & Wilcox,* 22 Fed. Supp. 384. This case involved a Nevada law to the effect that "one who operates a motor vehicle upon state highways must pay a license fee". The defendant did not pay the license fee and

the Court, in upholding the contract, used the following language:

> "Under the Nevada law, one who operates a motor vehicle upon the state highway must pay a license fee. This is undisputed. However, an executed contract cannot be set aside because one of the parties thereto has failed to take out a license imposed for revenue purposes when a penalty only is imposed for its violation. The contract of employment itself entered into was not rendered invalid by reason of the failure of the defendant to take out a license to operate as a motor carrier. This is remote from the relationship between the parties."

Again, in the case of *John A. Rosasco Creameries v. Cohn,* 276 N. Y. 274, 11 Northeastern (2d) 908, it was held:

> "If the statute does not provide expressly that its violation will deprive the parties of their right to sue and the denial of relief is wholly out of proportion to the requirements of public policy, the right to recover will not be denied."

In the above case there was a suit based upon a contract for the sale of milk. The statute provided that a license should be issued before one could engage in that business. The Court held that the license was one of revenue. Similar cases are cited at 118 *A. L. R.* 651. (See also, *Patterson v. Southern Railroad Co.,* 198 S. E. 364.)

(b) CONDITION OF THE EQUIPMENT.

The equipment of the appellees was suitable for the purposes of the contract. This phase was a factual question which the jury resolved in favor of the appellees. The testimony of Farr and Sinclair (Tr. p. 81) and of Herbert Thiel (Tr. pp. 65-70) was ample to support the findings of the jury. The jury was not bound to decide in conformity with the testimony of a number of witnesses as against a lesser number or other evidence which appears with more convincing force. One witness is sufficient for proof of any fact.

Huddy v. Chronicle Publishing Co., 15 Cal. (2d) 554.

(c) THE DEFENSE OF NOVATION IS NOT TENABLE.

Appellant having failed to dispose of the verdict on technical grounds, next advances the defense of novation. Here, again, there is no issue raised by the pleadings to this effect, nor was it mentioned in any pre-trial conference. However, let us explore its merit.

Novation is the substitution of any obligation for an existing one. Under the law, a novation is made by (1) a substitution of a new obligation by the same parties with an intention to extinguish the old; (2) by the substitution of a new debtor; or (3) by a substitution of a new creditor.

"A novation is subject to the general rules governing contracts."

Calif. Civil Code, Sec. 1532.

"That being so, it requires consideration."

Manfree v. Schock, 210 Cal. 279, 292 Pac. 465.

"And further requires an intention to discharge the old contract."

Blummer v. Madden, 128 Cal. App. 22, 16 Pac. (2d) 319.

"And such intention must be clearly indicated by all parties. A novation should not be confused with modification or alteration.

"A contract of novation must be supported by sufficient consideration."

Pearsall v. Henry, 153 Cal. 314.

"There must be a substitution of a new obligation which changes the rights and relationships of the parties."

Young v. Benton, 21 Cal. App. 314;

Lindner Hardware Co. v. Pacific Sugar Co., 17 Cal. App. 81;

20 *Cal. Juris.* 249.

"A mere modification of the terms of the original contract such as an extension of time is insufficient to show an intention that it shall operate as novation."

Parkside Realty Co. v. MacDonald, 166 Cal. 426.

"Where an agreement changes the obligation of the parties in no respect but relates merely to remedying defects in performance, etc., there is no novation."

Hallenslelen v. Heine Piano Co., 54 Cal. App. 295.

The effect of novation is to extinguish the old obligation and substitute a new obligation. The rights of the respective parties thereafter are governed by the new obligation.

Now, let us apply the foregoing general rules to the facts here. What happened was this: At a certain time in the early stages of the performance of this contract the weather at the Bethlehem Steel Co. plant was such that it made it impossible to do the work under the conditions originally contemplated. It had rained consistently for ten or fifteen days prior to December, and during the early part of December. There were no roads, the mud was deep and there was very little traction for the trucks. Difficulties encountered were inescapable and not anticipated by Farr and Sinclair, or any other persons working for the Macco Construction Co. It became necessary to change the equipment on the trucks to meet these conditions. On some occasions it was necessary that caterpillars haul out trucks stuck in the mud; on other occasions due to the sluggishness of the dirt to be removed, the steamshovels broke sideboards, some of the dirt fell on the cabs and it was necessary to take proper precautions to see that this did not reoccur. In order to meet these contingencies, steel planks and steel shields were placed over the cabs. Defendant's agents said nothing about a change in the terms of the contract. Nothing was said about paying more or less than $2.70 per truck per truck hour; nothing was said about paying more or less to the truck drivers than $1.43; nothing further was said

about the duration of the contract, nor the length of time necessary to complete the work; nothing was said as to whether the work would go on 21 hours a day or for 8 or 12 hours a day; nothing was said as to how long the plaintiffs would remain on the job; there was no substitution of any kind or character in the original terms of the contract. At most, all that can be said was that the trucks furnished by the plaintiffs were to be equipped with steel sideboards and a steel shield. Could this be interpreted as a substitution of a new obligation for the old? Was anything said that the job was not to last four months? Is there any evidence that at that conversation the original contract was changed?

We have no quarrel with the authorities cited by the appellant, but they are not in point. It cannot be said that the novation as described in pages 42 and 43 of the appellant's brief had anything to do with the license to haul over public streets. Certainly if it is contended that the novation occurred because the drivers of the defendant using the plaintiffs' trucks were directed to haul the dirt from the Bethlehem property to some other location, that in itself is not sufficient to justify a novation. The necessary elements are lacking. All that could be said is that there was a modification of the place where the trucks were to dump their loads.

There was no consideration; there was no substitution of the payment to be received; there was no substitution of the payment to be made to the drivers; there was no consideration for the alleged substitu-

tion or novation; there was no substitution as to the length of time to be worked by the plaintiffs, or the duration of the contract; and there was no new legal obligation.

Appellant's cases are not in point.

In *Prafd v. Strain,* 11 Cal. App. 74, cited by appellant, plaintiff had a contract to be paid on a commission basis for the sale of cabbage. Subsequently he purchased the cabbage under a new contract. The Court properly held that upon the substitution of a contract to purchase rather than a contract to pay, the second contract was in force and the first contract was properly extinguished.

In the next case cited by appellant, *Producers Fruit v. Goddard,* 75 Cal. App. 737, an oral contract and a written contract were involved, each contradicting the other, and the Court properly held that if an oral contract was made subsequently and with an intention to substitute for the written one, the written one became *functus officio.* Surely, in the instant case, there is no evidence that any contract was substituted for and in the place of the original contract made and entered into, relied upon and performed by the parties hereto. What proof or conduct is there to point to an attempt of these plaintiffs to substitute any new contract for their original contract? There is no merit in the novation theory.

3. DAMAGES.

(a) The damages were not excessive. This case was tried before a jury. It unanimously resolved all questions of fact as to the existence of a contract, and the duration thereof in favor of appellees, and awarded damages in the sum of $2500. The Courts are reluctant to disturb a verdict unless it is clearly against the weight of evidence. Where there is substantial evidence to support the verdict it will not be set aside unless it will result in a miscarriage of justice. The mere fact that there was a conflict in the evidence as to the extent of the damages suffered is not sufficient grounds for setting it aside or awarding a new trial. A perusal of the evidence discloses substantial evidence to support the verdict.

The evidence demonstrates that upon the execution of the contract and assignment (referred to as Plaintiffs' Exhibit A) plaintiffs purchased from Young & Son equipment for the sum of $3500; as a result of the termination of the contract by defendant, they became indebted to Young & Son to the extent of $1500. In addition thereto, for improvements, repairs, tires, etc., they spent the sum of $1100. (Tr. p. 96.) The net profit per truck was seventy-five cents per hour per truck worked, and basing it upon the contemplated work, profits would have amounted to $63 per day, for four trucks. This is arrived at by an accurate account of the expenses per truck hour, and is based upon the actual expense that occurred on the job with the exception, of course, of those items which are charged to capital investment. It must be

remembered that all of these trucks were overhauled completely and new tires were put on them. Witness Sinclair testified as to operating costs (Tr. pp. 85 to 120):

Insurance	$ .27	per	truck	hour	(p. 86)
Gas, oil, grease, etc...	.58	"	"	"	
Mechanic's time.....	.32	"	"	"	
Parts	.42	"	"	"	
Breakdown time	.36	"	"	"	
Total expenses ...	$1.95	"	"	"	
Amount paid	$2.70				
Total Expenses ...	1.95				
Net profit	$ .75	"	"	"	(p. 85)
Net profit on four trucks	3.00	"	"	"	

The question of cost and overhead is arrived at as follows:

Insurance:

The actual insurance cost while on the job was $172.60. This amount divided into the actual amount of hours the trucks worked amounts to the figure of 27¢ per truck hour. (Tr. p. 86.)

Gas, oil, grease, etc.:

The actual cost of gas, oil, grease, etc., while on the job amounts to $374.82. This amount divided into the actual number of hours the trucks worked amounts to 58¢ per truck hour.

Breakdown:

Out of a total number of hours worked before termination of the contract, the trucks were actually down 55 hours. This amounts to $148.50 in truck time lost and $92.34 in drivers' time lost, making a total of $240.84. This amount divided into the total number of hours the trucks worked gives the amount of 36¢ per truck hour. This figure is higher than that testified to by defendant's manager.

Parts, etc.:

The amount spent while on the job was $262.34. In addition there was $21.35 spent and charged to defendant. The total amount spent while on the job was $283.69. The amount divided into the total amount of hours the trucks worked amounts to the above figure of 42¢ per truck hour. This amount does not include, however, money spent for capital investment, but only refers to parts used on the job.

Mechanics' time:

The only equitable manner in which the figure of 34¢ per truck hour can be computed is to figure how much it would be under normal operating conditions; plaintiffs intended using one mechanic per shift which would amount to $9 for 28 truck hours. By dividing $9 by 28, a figure of 32¢ per truck hour is arrived at. It is true that the mechanics' time cost more than this because prior to the time that the truck operated

> overhaul work, tuning up, etc. was done for the purpose of getting the trucks in shape for the service. This expense, however, is not charged as overhead but is charged as capital investment. It is customary to expect some trouble at the start of any job. Of course, with the extraordinarily bad weather conditions that prevailed, normal operating conditions did not prevail at the start and it was necessary therefore to outlay a greater expenditure at the start which expenditure would not reoccur as the job progressed.

In addition to the $2.70 per truck per truck hour, appellant also agreed to pay $1.43 per man per truck hour. No consideration in the foregoing figures is therefore given to the expenses of the drivers as these are taken care of by the above amount of $1.43 which was paid by the appellant directly to the drivers as above indicated. Part of this amount was for social security, insurance, etc. The evidence showed on the days worked, appellant did not avail itself of the use of all the equipment of appellees. Appellant computes, however, the total amount of job days worked on that basis without demonstrating or showing the reason appellees' trucks did not work was because they were not permitted by the appellant to work.

Appellant's figures are not accurate. For the purpose of argument, let us assume that the 17½ days of 21 hours each amounts to 366 hours; based upon a profit of 75¢ per hour for four trucks, or $3 per hour, this shows a profit of $1098 for 17½ days' work.

The total number of days the job took was 55 1/6 days, plus 8 days for cleaning up. (Appellant's Opening Brief, p. 10.) At the rate of $63 per day profit, the damages would amount to $3475 for four trucks for 55 1/6 days, as based on the appellant's computation.

However, that is assuming the figures given by defendant are accurate; but this action is based upon an alleged breach of contract for hiring for a period of four months. Damage was for this breach.

Appellant has indulged to some extent in the manipulation of figures to justify a contention that the damages are not sustained by the evidence. Again, the jury accepted the appellees' interpretation and found as a fact that the appellees had been damaged.

The test given for the measure of damages has been sustained in various decisions by our Federal Courts. In 110 U. S. 338, it has been held that for the breach of an obligation on contract, damages, if ascertainable, can have included the loss of prospective profits as well as any outlays necessary in the preparation for the undertaking of such work.

In *Grand Trunk Railroad Co. v. Nelson,* 116 Fed. (2d) 823, 837, the Court held:

> "In calculating damages to a contractor when, without his fault, the other party during the progress of the work, delays or terminates it, the object is to indemnify the innocent party for the losses sustained and gains prevented by the action of the guilty party, considering these elements in relationship to each other. The profit

and loss must be determined according to the circumstances of the particular case and overhead expenses as well as original outlay should be considered."

In *U. S. v. Purcell Envelope Co.,* 249 U. S. 313, the Court, in dealing with the measure of damages for the alleged violation of a contract to perform, laid down the rule that the law of estimated profits was a correct measure of damages.

To the same effect:

Philadelphia Railroad Co. v. Howard, 54 U. S. 307;

White River Levee District v. McMillan, 40 Fed. (2d) 873.

"The fact that damages are uncertain or difficult of ascertainment does not prevent recovery."

Ironton v. Harrison, 212 Fed. 353;

Invey v. Phillips Petroleum, 36 Fed. Supp. 811;

American Can v. Frankhauser, 279 Fed. 727;

Hanley v. Delaware Railroad, 21 Fed. 541;

Rudolph v. Johnson, 127 Cal. App. 461;

27 *Fed. Digest* 103.

Appellant states that the drivers were to be paid by the appellant and this amount should be charged back as part of the overhead. Of course, to indulge in this theory instead of figuring that the plaintiffs would be paid $2.70 per truck per truck hour, it would be necessary to add the sum of $1.43 per truck per truck hour and the result would be the same. This item has been left out of the computation be-

cause it does not give a true picture. Also, there was left out the item of tires, as no depreciation was taken into consideration for the reason that all of that was charged to original investment and it was not necessary to take into consideration what was spent for the capital investment. After the job was finished the capital would be depreciated of course, or it might have been increased as subsequent events further developed. The jury, in arriving at the verdict, had before it all of the elements which make up overhead, and determined the damages accordingly. Workmen's compensation and Social Security were paid out of the $1.43 which was paid by the defendant and has no place in the computation.

It is not true, as appellant contends, that fixed expenses remain constant to such an extent that the trucks worked 42 per cent of the time. There were unusual conditions existing at the start of the job and those conditions disappeared after the job was commenced. The weather became better, the roads were more workable, and the men could gain access to and from the loading zones more easily. So, with better conditions the cost of operating, and the cost of repairs would naturally be lessened and the profit increased. Appellant takes isolated figures and by juggling them, assumes that the trucks worked only 42 per cent of the total work time. That is not a fair nor an accurate test. The fact is that the work sheet showed the number of hours actually worked and there is no evidence contrary to show that the trucks were not available and in working condition

when called upon to work. The fact is that of the time they were called to work the breakdown time was nominal. This was one of the issues submitted to the jury and it found contrary to the appellant's contention. On page 16 of appellant's brief, appellant sets forth a computation which it made up for the purpose of demonstrating a loss rather than a profit. This matter was before the jury and the jury decided contrary to such computation. It is not based upon actual expenditures nor is it based upon any records of Farr and Sinclair, but solely upon records which were made up by Mr. Tucker, the appellant's accountant. All of the figures used by Farr and Sinclair are accurate figures. There is no need of speculation. There is no merit in the position that capital investment should be considered in arriving at a profit. The decisions hold to the contrary.

It is perfectly obvious that the $2500 in damages is fair and reasonable. The jury would have awarded more if it could have awarded damages to take care of additional expenses outstanding.

Answering the various specifications of errors the appellee states:

1. That it was not necessary to secure a permit from the Railroad Commission of the State of California. The contract was not illegal. The law requiring a license was revenue raising and therefore *malum prohibitum*. If it was necessary to secure such a license the appellant is estopped at this time from invoking such a defense on the grounds that it was the party directing where the loads of dirt were to

be dumped, it had control over the drivers. All it hired of the appellees was the equipment and the services of the appellees.

2 and 3. The evidence justifies the award of damages. It being a factual question resolved in favor of the appellees by the jury, the reviewing Court will not disturb such a finding. The evidence affirmatively supports the amount of damages rendered by the jury.

4. The question of duration of the contract was a factual one and resolved in favor of the appellees.

5. No novation took place as no new contract was entered into.

6. The question of fact was submitted to the jury as to the breaching of the contract and the jury finding in favor of the appellees on a factual question will not be disturbed by the reviewing Court.

7. The action of Young & Son was dismissed and no prejudice was suffered by the appellant by such dismissal. As a matter of fact, Young & Son had sued the appellees and such action was pending at the time of the hearing of this suit. The action here was one for damages for the breach of contract and it was not contemplated that Young & Son were to receive such money but were only to take a certain sum out of that which was earned under the contract.

No prejudicial error was committed by the trial Court on any of the motions made in refusing to give any of the instructions. What occurred to cause the breach of contract was simply this: Defendant would have to pay a penalty if the work was not com-

pleted before the expiration date in April. Due to the inclement and very unusual weather which prevented steamshovels and other work in the manner originally contemplated, the work had slowed down, trucks got stuck in the mud, shovels could not be moved from one location to another; the work did not progress as contemplated. During this period appellant's trucks were busy in San Diego; they were larger trucks than those furnished by the appellees; the San Diego job was completed before schedule, releasing appellant's trucks for the San Francisco job. It was more economical for appellant to operate its own trucks, which it did at or about the same time it discharged appellees and terminated the contract without cause and placed its own trucks on the job. It must be remembered that among the other contentions of the appellant was that the equipment of the appellees was not satisfactory for the purposes for which it was hired. Apparently this contention has been abandoned as it certainly is not consistent with the position that there never was a meeting of the minds or that the contract is void.

It is respectfully submitted that the judgment should be affirmed.

Dated, San Francisco,
February 8, 1943.

Respectfully submitted,

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